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**Between Fact and Norm:
Narrative and the Constitutionalization of Founding Moments**

Ming-Sung Kuo^{*}

[Abstract]

Both the subject who gives birth to a constitution and the time a constitution comes into being are part of the multifarious construct of the genesis of a constitution. The intertwining of the constituent power (subject) and the founding moment (time) not only gives rise to issues at the centre of scholarship on constituent power but also speaks to ambiguities about the relationship between the founding moment and its ensuing constitutional order in constitutional theory. In this paper, I examine the question of the founding moment in constitutional scholarship in light of the antinomy between fact and norm. I argue that contemporary constitutional theories fail to account for the role of the founding moment in the constitutional order because they are absorbed in the narrow question of constitutional interpretation at the expense of making sense of the constitutional order. Drawing upon Robert Cover's inspiring discussion of nomos and narratives, I contend that the founding moment is pivotal to the discovery of constitutional meaning as it stands as the reservoir of the enriching narratives about the birth and growth of a constitutional order. Through narratives, the founding moment is related to its ensuing constitutional order and thus 'constitutionalized', suggesting a broader understanding of interpretation in constitutional theory than contemporary constitutional theories assume. On this view, the founding moment is neither a mere historical fact nor a placeholder for universal norms. Rather, narratives about the founding moment concern more the invigoration of the existing constitutional order than its original foundation. Thus emerges an alternative attitude towards the unsettling concept of constituent power: the constituent power's appeal does not so much lie in the substitution of a new constitutional order for the existing one as in its rejuvenation of the latter since it is reincarnated in the narratives-mediated constitutionalized founding moment.

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[Keywords] fact and norm, founding moment, constitutional identity, constituent power, Robert Cover, narratives, constitutional *nomos*, constitutional interpretation, constitutional imagination

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I. INTRODUCTION

The character and identity of a constitutional regime (or simply constitutional identity) is not a novel concept in constitutional theory but has seen a resurgence in recent scholarship.¹ Such anthropomorphic references to the issues resulting from the continuity

¹ Traditionally, the key question concerning constitutional identity is whether a changing constitutional order should be regarded as the continuation of the original one or as the replacement that is new and distinct from it. Jan-Herman Reestman, 'The Franco-German' Constitutional Divide: Reflections on National and Constitutional Identity' (2009) 5 *EuConst* 374, 382-84; Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 *ICON* 411. Notably, a recent wave of literature on constitutional identity centres on the question of 'identification' and is more or less sociologically oriented. See 412. Under this view, constitutional identity appears to be a special form of national identity. Compare Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 11-12 with Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 9-10. For the present purposes, constitutional identity is understood in its traditional sense.

and change of constitutional orders have proliferated on both sides of the Atlantic and beyond over the past three decades.² On this view, a constitution has its genesis. Far from being a unitary construct, the genesis of a constitution has generated a set of topics for further investigation in constitutional theory. The subject who gives birth to a constitution is one; the time when a constitution comes into being is another. Both being part of the multifarious construct of the genesis of a constitution, the constituent power (subject) and the founding moment of constitutional orders (time) are intertwined. Bringing the crucial role of momentous constitutional politics in understanding a constitutional order to the fore, Bruce Ackerman's theory of constitutional moment is an exemplar.³ Yet, as many of his critics have pointed out, how the construct of constitutional moment is related to the constitution itself is unclear. Is it a function of the existing constitutional order or a manifestation of extraconstitutional power? Is it norm or merely fact? Is it situated within or without the constitutional order?⁴

Although these issues have been at the centre of scholarship on constituent power, they also speak to ambiguities about the relationship between the founding moment and its ensuing constitutional order in constitutional theory. Yet, there is a fundamental difference in character that makes the question of the constitutional status of the founding moment more complex than the idea of constituent power. In contrast to the idea of constituent power, the founding moment is more than a conceptual construct. Rather, the founding moment of a constitutional order points to the series of historical events that lead to the adoption of the constitution.⁵ That difference suggests that beneath the relationship between the founding moment and its ensuing constitutional order are questions about the identity of constitutional theory itself: Is the historical founding moment relevant to the theorization of the constitution at all? If so, how is the originary moment being considered in constitutional theories? Is the state of the art satisfactory? Can we rethink the question of the founding moment in constitutionalism beyond current theoretical positions?

My paper takes up these issues at the core of constitutional theory by examining the question of the founding moment in constitutional scholarship in light of the antinomy between fact and norm. I argue that contemporary constitutional theories fail to account for the role of the founding moment in the constitutional order because they are absorbed in the narrow question of constitutional interpretation at the expense of making sense of the constitutional order. Drawing upon Robert Cover's concept of *nomos*,⁶ I contend that with

² See eg Reestman (n 1); Polzin (n 1); Bruce Ackerman, *We the People, Volume 1: Foundations* (Belknap 1991); Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press 2001); Chaihark Hahm and Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (CUP 2015).

³ Ackerman (n 2).

⁴ See eg Andrew Arato 'Carl Schmitt and the Revival of the Doctrine of the Constituent Power in the United States' (2000) 21 *Cardozo Law Review* 1739.

⁵ This distinguishes the Ackermanian constitutional moment from the historical founding moment of a constitutional order. While both point to an extended period of time during which a constitutional order originates or undergoes great transformation, the former turns out to be a theory of constituent power, which is related to but separate from the question of the status of the founding moment in a constitutional order.

⁶ Robert M Cover, 'The Supreme Court, 1982 Term -- Foreword: *Nomos* and Narrative' (1983) 97 *Harv L*

an eye to the understanding of the constitution beyond the interpretation of constitutional norms, the constitutional order needs to be recast as a constitutional *nomos*. As a constitutional *nomos* operates not only on constitutional norms but also on the enriching narratives about the birth and growth of a constitutional order, the founding moment is pivotal to the discovery of constitutional meaning in this broad sense. Through narratives, the founding moment is related to its ensuing constitutional order and thus ‘constitutionalized’, suggesting a broader understanding of interpretation in constitutional theory than contemporary constitutional theories assume. On this view, the founding moment is neither a mere historical fact nor a placeholder for universal norms but rather serves as the reference point for constitutional redemption that renders the constitutional order ‘jurisgenerative’.⁷ Narratives about the founding moment concern more the invigoration of the existing constitutional order than its original foundation. This observation further suggests an alternative attitude towards the unsettling concept of constituent power:⁸ the constituent power’s appeal does not so much lie in the substitution of a new constitutional order for the existing one as in its rejuvenation of the latter since it is reincarnated in the narratives-mediated constitutionalized founding moment.

My argument proceeds as follows. In the first place, I shall establish that two opposite views dominate current constitutional scholarship on the question of the founding moment. As I shall explain, under the historicist view, the founding moment is fact only;⁹ under the normativist view, it is absorbed into constitutional norms. Neither is satisfactory as the question of the founding moment in constitutionalism is reduced to a methodological debate about constitutional interpretation among specialists (II). Taking issue with this jurispathic rendering of the founding moment in contemporary constitutional theories, I shall continue to propose a relational approach to the constitutionalization of the founding moment by drawing upon Cover’s ideas in ‘*Nomos and Narrative*’.¹⁰ Situated between fact and norm and mediated by narratives, the founding moment conceived of this way will turn the enterprise of constitutional interpretation into one of *nomos*-building that invites revitalizing narratives from citizens in the discovery of the meaning of the constitutional project. Thus, the narratives-mediated constitutionalization of the founding moment also entails an alternative account of the constituent power (III). To conclude, I shall underline the implications of the relational approach to the constitutionalization of the founding moment to constitutional theory in terms of substance, process, and structure (IV).

Rev 4.

⁷ For the distinction between a ‘jurisgenerative’ and a ‘jurispathic’ legal order, see *ibid* 40-44. For a different understanding of whether a legal order is jurisgenerative, see Frank Michelman, ‘Law’s Republic’ (1988) *Yale LJ* 1493; Seyla Benhabib, *Another Cosmopolitanism* (Robert Post ed, OUP 2006) 48-50.

⁸ Hahm and Kim (n 1) 35; David Dyzenhaus, ‘The Politics of the Question of Constituent Power’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 129; Martin Loughlin, ‘The Concept of Constituent Power’ (2014) 23 *European Journal of Political Theory* 218.

⁹ I use the term historicist to denote this particular attitude among historians towards historical events.

¹⁰ Cover (n 8).

II. FACT OR NORM? FOUNDING MOMENTS ENVISAGED IN CONSTITUTIONAL THEORY

As the question of the founding moment in constitutional theory concerns how to fit historical facts into the conceptualization of a normative order, I follow in the footsteps of those who have utilized the antinomy between fact and norm as the analytical framework for manifold legal and constitutional issues.¹¹ Situating theories of the founding moment in constitutionalism in this antinomy, I begin with a discussion of historicist theories in which the founding moment is regarded as fact. Unveiling the interpretive character of constitutional theory, I note that historicist theories oscillate between disregard and fidelity in their attitude towards the founding moment as a matter of fact. Then I turn to the normativist strain. In contrast to the historicist oscillation between disregard and fidelity, normativists effectively equate the founding moment with the original values that underlie constitutional provisions. After disclosing the historicist and normativist views of the founding moment, I discuss why neither is satisfactory as both reflect the gap in constitutional imagination that contemporary constitutional theories of the founding moment help create.

A. When Founding Moments Are Historical Facts Only: Disregard, Fidelity, and the Identity of Constitutional Theory

A new constitutional order is mostly established in response to the failure of the existing regime. The founding moment of a new constitution is thus a moment of crisis when the old constitutional order breaks down as a result of national liberation movement, civic uprising, military defeat, economic breakdown, or other precipitous events.¹² Antipathy towards foreign or colonial regimes,¹³ resistance against repressive rulers,¹⁴ anger at failed war plans and strategic blunders,¹⁵ discontent with socioeconomic justice,¹⁶ and other socio-psychological responses are usually recorded in crises leading up to the founding of a new constitution. To be sure, these reactions to the tumultuous situation in which a new constitutional order originates are not the only occurrences in the founding moment that are recorded. The debates over how to respond to the failure of the old regime, the wrangling over the process and substance of the new constitutional order, and the tabulation of the votes cast in the convention or the referendum on the adoption of the new constitution are also part

¹¹ Examples include Rosenfeld (n 1) 42; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press 1996).

¹² See Jon Elster, 'Constitution-Making and Violence' (2012) 4 *Journal of Legal Analysis* 8.

¹³ See Ruth Gordon, 'Growing Constitutions' (1999) 1 *UPa J Const L* 528.

¹⁴ See eg Adam Roberts, 'Civil Resistance and the Fate of the Arab Spring' in Adam Roberts and others (eds), *Civil Resistance in the Arab Spring: Triumphs and Disasters* (OUP 2016) 270.

¹⁵ See eg Yaprak Gürsoy 'Civilian Support and Military Unity in the Outcome of Turkish and Greek Interventions' (2009) 27 *Journal of Political and Military Sociology* 47, 59-60, 65.

¹⁶ See eg Rehan Abeyratne, 'Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy' (2014) 39 *Brooklyn J Int'l L* 1.

of the historical record of the founding moment of a constitutional order.¹⁷ All of them are *fact*. Thus, the accuracy of how they are documented and presented underlies the study of the founding moment as a matter of fact.

Driven by the pursuit of historical truth and its accurate representation, scholars of the founding moment dig deeper and deeper into the details of its constitutive episodes. On this view, the founding moment is a historical object to be faithfully represented.¹⁸ Yet, the accurate, specific, comprehensive representation of the founding moment does not tell us much about the relationship between the founding moment and its ensuing constitutional order. Instead, it is a question of how the founding moment as a matter of fact is seen in the eyes of constitutional theory, raising the question of the identity of constitutional theory.

The task of constitutional theory is to provide a language that gives expression to the political life under the constitution.¹⁹ To make sense of the constitutional order as a political project is what constitutional theory is all about. Interpretation (*vis-à-vis* explanation) underpins the enterprise of making sense of the constitutional order.²⁰ Noticeably, one defining character of contemporary constitutional theories is the fascination with the question of what norms in the constitutional ‘text’, which extends beyond the codified constitutional document, mean.²¹ This predilection for interpreting norms is not without reason especially in light of the new frontiers of constitutional scholarship. Studies of constitutional orders have long extended beyond the exegesis of the constitution to issues about how constitutional norms are implemented, what explains the gap between precept and practice, to what extent the practice has displaced or amended the norms, etc.²² Yet, none of them can be addressed without confronting the question of what constitutional norms mean. For example, the question of how constitutional norms are implemented is predicated on the cognizance of what to implement. This obtains only when the radius of what constitutional norms stipulate has been determined through interpretation. Interpretation remains indispensable to constitutional studies that centre on the explanation of the gap between the law on the books and the law in action, too. The reason is simple: If the law on the books is unknown, how can we even raise the question of why there is variance between it and the law in action? What the law on the books stipulates only becomes clear as a result of interpretation.²³

¹⁷ See eg Max Farrand, *The Framing of the Constitution of the United States* (Yale University Press 1913).

¹⁸ This corresponds to ‘descriptive representation’ developed in Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press 1967) 60-91.

¹⁹ Sanford Levinson, *Constitutional Faith* (Princeton University Press 1988) 191-94.

²⁰ The role of interpretation in making sense of the constitutional order is further discussed in III.A.

²¹ See Jed Rubenfeld, ‘The Paradigm-Case Method’ (2006) 115 *Yale LJ* 1977, 1977; Mark A Graber, *A New Introduction to American Constitutionalism* (OUP 2013) 3; Martin Loughlin, ‘The Constitutional Imagination’ (2015) 78 *MLR* 1, 14. ‘Text’ here is understood in a broad sense and not restricted to constitutional provisions or judicial doctrines.

²² See eg Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014).

²³ See Ming-Sung Kuo, ‘A Dubious Montesquieuian Moment in Constitutional Scholarship: Reading the Empirical Turn in Comparative Constitutional Law in Light of William Twining and His Hero’ (2013) 4

I hasten to add that nothing I have said so far suggests that interpretation of constitutional norms is the only legitimate component or the most important characteristic of all theoretical studies of the constitution. Instead, a quick survey of recent literature on constitutional scholarship will reveal that constitutional theory has extended beyond the matter of interpretation.²⁴ Nevertheless, the foregoing two examples indicate that interpretation of constitutional norms in the text constitutes the sine qua non of constitutional theory.²⁵ When this interpretive core is revealed, the stance of contemporary constitutional theories towards the founding moment as a matter of fact also transpires.

Considered fact, the founding moment is not necessarily integral to constitutional theory as the constitutional status of the founding moment depends on the theoretical position on the relationship between fact and constitutional interpretation.²⁶ To put it differently, contemporary constitutional theories oscillate between disregard and fidelity with respect to the historical founding moment. To some, constitutional interpretation amounts to a function of the system of constitutional norms as exemplified in Hans Kelsen's pure theory of law. Under this view, there may be disagreement on whether the focus of emphasis should be on individual constitutional provisions or on the structural relationship between them. Nevertheless, textualists and structuralists share the belief that they confine their determination of the meaning of constitutional norms within the normative system without taking fact into consideration. To be clear, text and structure are not the only constituents of the system of constitutional norms. Judicial interpretations of the constitution are also widely considered part of the normative system.²⁷ Standing as historical event instead of legal precedent, however, the founding moment is to be disregarded by those who adopt an internal view of constitutional interpretation, regardless of whether they take a Kelsenian purist stance or not.²⁸

On the opposite end are those who take the view that fact is not only a component of interpretation. Interpretation of constitutional norms cannot be legitimately rendered without receiving guidance from fact. On this view, the founding moment as fact is indispensable to the exercise of constitutional interpretation as well as to the deciphering of the constitutional order in practice. In contemporary constitutional theories, the foremost advocates for reading constitutional norms in light of the founding moment are those dubbed originalists.²⁹ Among the myriad facts of the founding moment they take into consideration, it is those pertaining to the adoption of constitutional provisions that interest

Transnational Legal Theory 487, 497-96.

²⁴ Hirschl (n 24).

²⁵ Martin Loughlin even goes further and observes that '[c]onstitutional scholarship is today driven by a desire to discover an authoritative method of constitutional interpretation'. Loughlin (n 23) 14.

²⁶ cf Grégoire CN Webber, 'Originalism's Constitution' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP 2011) 147, 154.

²⁷ Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books 2012) ix-xiii.

²⁸ See also Frank I Michelman, 'Constitutional Authorship' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 64, 68-74.

²⁹ Rubinfeld (n 2) 63. See also Lael K Weis, 'What Comparativism Tells Us about Originalism' (2013) 11 *ICON* 842.

them most. Or, to put it in a slightly exaggerated way, the whole historical record of the founding moment is examined only to determine the content of constitutional norms.³⁰

Notably, originalism is not the only way to take account of the historical facts of the founding moment in the interpretation of constitutional norms.³¹ Some constitutional scholars cast eyes beyond constitutional norms in their interpretation of the constitutional order.³² Even so, what theories in this strain of the historicist stance have in common is the view that the founding moment as historical fact provides the key to the status quo of the constitutional order and the guidance on the way forward.³³ When the founding moment as historical fact is considered in the interpretation of constitutional norms, it is not only one of the many facts to be taken into account. It is given a special status, standing out from other periods of time. This backward-looking attitude results from the special interpretive character of constitutional theory.³⁴ Framed within a progressive, linear temporality, constitutional interpretation cannot do away with the concept of authorship.³⁵ Driven by the anthropomorphic characterization of the constitutional order, however, authorship becomes a conceptual framing of interpretation and is further perceived as the authenticity and primacy of the original intent of the attributed author of constitutional norms.³⁶ As a result, the founding moment as a matter of fact is not only essential to the interpretation of constitutional norms. The relationship between fact and interpretation becomes one of fidelity. Originalists are just exemplary of those who hold the relationship between the historical founding moment and constitutional norms to be one of fidelity.³⁷

B. What If Founding Moments Resolve into Constitutional Norms: A Mere Matter of Interpretation

While the founding moment comprises historical occurrences, it may or may not appear as fact in the eyes of constitutional theory. Just as the Ackermanian constitutional moment

³⁰ Ackerman's effort to identify 'constitutional canons' from the practices of constitutional moments is an example. See Suzanna Sherry, 'The Ghost of Liberalism Past' (1992) 105 *Harv L Rev* 918, 933.

³¹ Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (OUP 1982) 9-24.

³² Ackerman's constitutional theory suggests a broader notion of constitutional interpretation. Nevertheless, it remains focused on the deciphering of the normative imperatives of the existing constitutional order in light of historical occurrences in the preceding constitutional moments. Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Belknap 1991) 7, 71.

³³ See also Weis (n 30) 846; Jack M Balkin, *Living Originalism* (Harvard University Press 2014).

³⁴ Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press 1999) 43-49.

³⁵ Wilfrid J Waluchow, 'Constitutional Interpretation' in Andrei Marmor (ed), *The Routledge Companions to Philosophy of Law* (Routledge 2012) 417. See also Sotirios A Barber and James E Fleming, *Constitutional Interpretation: The Basic Questions* (OUP 2007) 62-63.

³⁶ This is the originalist position, which Paul Kahn argues mistakes writership for authorship in constitutional interpretation. See Kahn (n 2) 268-70; Paul W Kahn, *Making the Case: The Art of the Judicial Opinion* (Yale University Press 2016) 48-51.

³⁷ Notably, the requirement of fidelity in constitutional interpretation does not necessarily result in the Scalian style of originalism. Balkin (n 33).

is more akin to conceptual construction than historical reality,³⁸ the founding moment may stand as norm instead of fact to its ensuing constitution. This is what I call the normativist view of the relationship between the founding moment and the constitutional order.

As I have noted above, virtually all constitutional orders have their own historical founding moment. In contrast to historicists, normativists regard the historical events, institutional innovations, prescriptive rules, or political actions at the founding moment as the embodiment of normative principles and values.³⁹ What matters to constitutional theory is not that which actually happens at constitutional founding. Instead, it is what lies beneath or behind these historical occurrences that interests constitutional theorists. Through the normativist lens, reading the founding moment is not aimed at digging out some hidden historical fact about constitutional founding that may influence constitutional interpretation. Rather, the founding moment is explored in order to extract the fundamental values and normative principles from the historical episodes that take place at constitutional founding.⁴⁰ I emphasize that it is in the values and principles, not the episodes, that normativists are interested. Reading the founding moment in this way is not so much the discovery of historical facts as the interpretation of constitutional norms. Thus, studies of the founding moment become part of constitutional interpretation. Both the founding moment and the constitutional order are turned into the objects of an integrated interpretive activity.⁴¹

Once the fact that both the founding moment and the constitution are incorporated into one comprehensive interpretation of the constitutional order is laid bare, the role of the founding moment in constitutional interpretation naturally transpires. As a matter of norm, the founding moment cannot be taken at face value but is rather to be viewed as the placeholder of the values and principles that have motivated the rejection of the old regime and further effected the institutional responses as embodied in the new constitution.⁴² Yet, with the translation of the principles and normative values at the founding moment into the underlying values and principles of positivized constitutional norms,⁴³ the relationship between the founding moment and the resulting constitution is also fundamentally transformed under the normativist view. What Jed Rubenfeld calls the ‘paradigm case interpretation’⁴⁴ illustrates such a transformation.

Under the paradigm case approach to constitutional interpretation, reading a constitutional provision in light of the particular issue its framers intended to tackle at the founding moment, which Rubenfeld calls the paradigm case, is aimed at correctly identifying

³⁸ See Ming-Sung Kuo, ‘Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering’ (2010) 23 *Ratio Juris* 390, 399.

³⁹ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 13.

⁴⁰ See generally Alan Gibson, *Interpreting the Founding: Guide to the Enduring Debates over the Origins and Foundations of the American Republic* (University Press of Kansas 2006).

⁴¹ See Amar (n 29) 51-94.

⁴² Rubenfeld (n 2) 183-88.

⁴³ By positivized constitutional norms, I mean the constitutional provisions in the Big-C constitution plus judicial doctrines that set out constitutional principles and rules.

⁴⁴ Rubenfeld (n 2) 178.

the purpose that is to guide its application to the case at hand. The founding moment and its paradigm case are thus treated as the primary illustration of the legislative purpose.⁴⁵ As reading the founding moment is pivoted to determining the purpose of positivized constitutional norms, the founding moment is absorbed into the post-founding constitutional order itself in that it resolves into the exercise of constitutional interpretation aimed at discovering the values and principles connoted by the purpose of constitutional norms.

If my observation is correct, the question of the founding moment becomes a matter of the interpretation of constitutional norms through the lens of normativists. As a result, the question of the founding moment seems to become part of the debate over interpretive methodology. Viewed thus, the normativist view of the founding moment comes close to the historicist stance that maintains the founding moment commanding fidelity from the constitution as both reflect the variations on the method of constitutional interpretation.⁴⁶ Taken together, the significance of the founding moment to its ensuing constitutional order appears to be a function of stance-taking or methodological competition in the exercise of constitutional interpretation, regardless of whether it is considered fact or norm.

C. Founding Moments Misconceived: Gap in Constitutional Imagination

My discussion of the historicist and the normativist view of the founding moment shows that their contrasting stances resolve into different methods of interpretation. Yet, this does not mean that the debate surrounding the founding moment is nothing more than a tempest in a teacup among constitutional scholars. Rather, an investigation of how the inevitable imaginary of constitutional authorship is reflected in the historicist and the normativist stance's towards the founding moment discloses a gap in constitutional imagination and the problem with contemporary constitutional theories.⁴⁷

As I have noted above, the historicists look to the founding moment as the source of fidelity because of its special status in the course of constitutional development. It is regarded as the moment in which the constitutional order is authored, or rather brought into being. On this view, constitutional authorship is reified in the historical founding moment and controlling, demanding fidelity from the future generations.⁴⁸ In contrast, the normativist stance towards the character of constitutional authorship is much less straightforward.⁴⁹ Through the normativist lens, the founding moment resolves into constitutional norms inasmuch as it is translated into normative purpose. The nature of

⁴⁵ Ibid. 180-92.

⁴⁶ What Jack Balkin calls 'framework originalism' suggests that the distinction is not so rigid between historicist and the normativist stances. See Balkin (n 35) 21-34.

⁴⁷ See Ming-Sung Kuo, 'Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman's Presentist Critique of Constitutional Authorship'. (2009) 7 *ICON* 683, 705-13. For a discussion on constitutional imagination that centres on the epistemic (vis-à-vis popular) aspect, see Loughlin (n 23).

⁴⁸ See Balkin (n 11) 2.

⁴⁹ See also Alexander Somek, *The Cosmopolitan Constitution* (OUP 2014) 128-33.

purpose distinguishes normativists from fidelity-oriented historicists with respect to constitutional authorship. It is noteworthy that normative purpose is different from the 'context' of which interpretation of constitutional norms is supposed to take account: the former is fixed whereas the latter is changing in nature.⁵⁰ I hasten to add that a fixed normative purpose does not necessarily lead to it being inflexible. Quite the contrary: Unlike text, purpose is made abstract and general to accommodate changes in context.⁵¹ With respect to the constitution, the purpose of positivized norms is fixed at constitutional founding but their application and the implications of the purpose to concrete cases can only be determined against the evolving context. Thus, sublimated into purpose, the founding moment in the normativist strain is not as controlling as its rendering in the hands of the fidelity-oriented historicists, suggesting a constitutional authorship that is more abstract and open to the changing context in the future.⁵²

Yet, the normativist view pays a hefty price to keep the idea of constitutional authorship alive: the abstraction, if not deformation, of the founding moment. As a result, the concreteness of the founding moment as conceived of by the fidelity-oriented historicists appears to be more accessible to the public than the abstract norms into which the founding moment is resolved under the normativist view. More importantly, even though interpretation is never identical with that which is to be represented through interpretation, concreteness is more likely to be associated with the presence of authenticity.⁵³ In the collective constitutional imagination that extends beyond specialists in constitutional interpretation, the constitutional order and its interpretation are seen as constantly seeking to approach the authenticity or identity of constitutional authorship.⁵⁴ Specifically, in the eyes of non-specialists, the historical founding moment is real and the associated representation of constitutional authorship appears to be authentic. All method-guided interpretations are expected to be able to speak to the identity of constitutional authorship at constitutional founding without fail. Yet, to specialists (except those who totally disregard the historical founding moment), neither the historicist nor the normativist view of the founding moment can bring forth the much longed-for authenticity of authorship. Whether the founding moment plays a controlling or an inspiring role in the constitutional order is a matter of interpretive method. Regardless of being fact or norm, the founding moment as recounted in constitutional interpretation does not concern constitutional authorship. This contrasting attitude towards the semblance of authenticity emanating from historical concreteness explains why originalism is not going away anytime soon.⁵⁵

There is no blaming non-specialists for ignorance in mistaking a particular form of representation of the founding moment (originalism) for its authenticity (the presence of constitutional authorship). Instead, here emerges a gap in constitutional imagination. Not

⁵⁰ cf Rubinfeld (n 2) 181-83.

⁵¹ *ibid* 188-91.

⁵² *ibid* 187-88. See also Kahn (n 38) 51-62.

⁵³ See Kahn (n 38) 126-34.

⁵⁴ See Paul W Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (Yale University Press 1997) 177-229. See also Larry Alexander, 'Introduction' in Alexander (ed) (n 30) 1, 1.

⁵⁵ Balkin (n??).

only failing to bridge the gap but widening it, contemporary constitutional theories are flawed in making sense of the founding moment in constitutionalism. Reconceiving the role of the founding moment in the constitutional order will be the first step towards narrowing the gap.

III. BETWEEN FACT AND NORM: IMAGINING FOUNDING MOMENTS IN THE CONSTITUTIONAL *NOMOS*

The gap between specialists and the public in constitutional imagination as noted above is not so much about the discrepancy between theory and practice as about the role of the founding moment in the constitutional order. Whether through the historicist or the normativist lens, the founding moment is understood as centring on the articulation of norms and guiding principles implicit in the constitutional order, suggesting a unidirectional relationship between the founding moment and the constitutional order. Regardless of disregard, fidelity, or absorption, the founding moment is either left out of the interpretation of the constitutional order (disregard), invoked to hold sway over the interpretation of constitutional norms (fidelity), or integrated into the norms as purpose (absorption). Moreover, such a unidirectional relationship is also ‘jurispathic’ as the founding moment plays no role in making sense of the ongoing operation of the whole constitutional order apart from settling individual disputes through interpretation, leading to the gap in constitutional imagination. From this perspective, the fidelity-oriented historicist view does not hold out much hope for a less jurispathic relationship between the founding moment and the constitutional order either since its associated semblance of authenticity only rests on misconception.⁵⁶

Yet, this is not the only way that the founding moment may bear on the constitutional order. Rather, the above unidirectional, jurispathic relationship can be turned genuinely relational and ‘jurisgenerative’ when the focus of constitutional theory shifts from constitutional interpretation to making sense of the constitutional order as a political project. To disclose what this relational view means to constitutional theory, I first draw upon Cover’s discussion of *nomos* and his view on the relationship between interpretation and meaning to lay the foundation for relating the founding moment to the constitutional order through narratives. As this view bears significantly on the genesis of the constitutional order, I then discuss why the founding moment emerging from the relational view can shed new light on the concept of constituent power.

⁵⁶ See also Paul W Kahn, *Finding Ourselves at the Movies: Philosophy for a New Generation* (Columbia University Press 2013) 68.

A. Beyond Interpretation: Constitutionalizing Founding Moments through Narratives

As I have suggested, constitutional theory is aimed at helping to make sense of the constitutional order as a political project. Interpretation is never an end in itself but only part of the continuous collective effort to make sense of what it means by organizing the political life of a particular political community as a constitutional order. As authenticity can never be exhausted by a particular interpretation,⁵⁷ constitutional interpretation cannot be saved from the accusation that it is unauthentic for deviating from the constitution itself.⁵⁸ Yet, it is in the never-ending pursuit of authenticity that the meaning of the constitutional order is also enriched and revealed through interpretation. In other words, making sense of the meaning of the political life under the constitutional order is embedded in the action taken in the quest for authenticity, namely, interpretation.⁵⁹ Thus, persuasion is integral to the political action taken by individual citizens to approach authenticity through interpretation.⁶⁰ In sum, the interpretive character of constitutional theory is only the surface manifestation of the unresolved but productive tension between interpretation and authenticity that makes persuasion necessary and keeps the meaning of the constitutional order alive.

Seen in this light, interpretive settlement is provisional at best as it itself faces the question that it fails to represent the identity/authenticity of the constitution.⁶¹ And the pathology of contemporary constitutional theories lies in the fascination with a final interpretation through the correct method without keeping the meaning of the constitutional order in sight. Worse still, constitutional interpretation has been commonly understood through the lens of ‘modalities’, becoming the game among specialists, if you will.⁶² Yet, Cover questioned such an attitude towards interpretation in the discovery of the meaning of the law, or rather, the constitutional order. His critique of interpretation as understood in constitutional-legal practice suggests an alternative view of the role of the founding moment in the constitutional order.

According to Cover, the common practice of legal interpretation that focuses on how to apply legal rules and other precepts to individual cases correctly is problematic for the discovery of the meaning in law.⁶³ Of the practice of constitutional and legal interpretation, Cover observed that the official agent of interpreting the law (the judge in most cases) is

⁵⁷ cf Kahn (n 58) 41-45, 67-77.

⁵⁸ See Balkin (n 11) 103-38. See also Kahn (n 38) 89-108.

⁵⁹ In other words, the constitutional order is more like performing art to be acted out than like literature text to be interpreted. To be sure, the performer interprets a drama, for example, before and through his performance. Balkin (n 11) 91-94.

⁶⁰ *ibid.* 12-13.

⁶¹ This suggests an implicit form of accusing such interpretations of usurping the (constituted) amending power and thus defying the design by the constituent power. William F Harris II, *The Interpretable Constitution* (The Johns Hopkins University Press 1993) 164-208.

⁶² Philip Bobbitt, *Constitutional Interpretation* (Blackwell 1991) 11-22.

⁶³ Cover (n 8) 6.

tasked with bringing finality and authoritativeness to the legal order of the modern state.⁶⁴ To achieve this goal, the agent backs up his interpretation of the legal order with discourse and force when necessary.⁶⁵ Obviously, force is disruptive to the pursuit of constitutional meaning when it is invoked to put paid to the debate over the meaning of the constitutional precepts concerned in the public sphere.⁶⁶ Besides, Cover further noted that facing the reality of legal pluralism, the judicial discourse is gravitated towards objectivity and universalism in the name of neutrality for fear of being seen as taking sides. As a result, ethos and particulars pertaining to individual cases, which give meaning to legal precepts, are obscured in the interpretive gravitation towards objectivity and universalism.⁶⁷ Modalities in theories of constitutional interpretation fail to come to grips with the root cause of this 'jurispathic' character of the common practice of constitutional interpretation.⁶⁸ Mistaking authority for persuasion, interpretive modalities do not help very much with the settlement of controversial constitutional issues.⁶⁹

Alternatively, Cover conceived of the law and the constitutional order as not only existing in but also envisaging a whole world, which Cover called a '*nomos*'.⁷⁰ A *nomos* is the normative universe we inhabit. Specifically, '[t]he rules and principles of justice, the formal institutions of the law, and the conventions of a social order are...but a small part of [such a] normative universe'.⁷¹ On this view, the meaning of the constitution is more the understanding of the whole constitutional order than the interpretation of individual constitutional norms, while the enterprise to discover the meaning of the constitution goes beyond the application of the methods of constitutional interpretation.⁷² To make sense of the legal institutions or prescriptions, Cover suggested, we need to relate them to 'the narratives that locate [them] and give [them] meaning'.⁷³ Situated in their discursive context, the legal institutions or prescriptions are no longer the commands of authorities but have their 'history and destiny, beginning and end'.⁷⁴ The purpose and meaning of legal institutions and prescriptions can only be fully grasped along with the underpinning narratives of the constitution order. As Cover further observed, '[legal] prescription [cannot] escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imagination'.⁷⁵ Given that the 'material reality' on which legal interpretation rests results from our imagination, history, literature, and other narratives also find their way into a normative universe.⁷⁶ Law as a *nomos* comprises both legal rules and principles and their meaning-embedding narratives.

⁶⁴ *ibid* 16.

⁶⁵ *ibid* 9-10, 13.

⁶⁶ Robert M Cover, 'Violence and the Word' (1986) 95 *Yale LJ* 1601.

⁶⁷ See Cover (n 8) 13.

⁶⁸ See *ibid* 40.

⁶⁹ See Balkin (n 11) 12-16.

⁷⁰ Cover (n 8).

⁷¹ *ibid* 4.

⁷² Compare Harris (n 63) 114-63 with Bobbitt (n 64) 9-30.

⁷³ Cover (n 8) 4.

⁷⁴ *ibid* 5.

⁷⁵ *ibid*.

⁷⁶ *ibid*. See also Harris (n 63) 103-13, 131-35.

The role of narratives in building a constitutional *nomos* figures prominently in the relationship between interpretation and the meaning in law as Cover conceived of. Appealing to the idea of commitment, Cover located '[t]he transformation of interpretation into [constitutional] meaning' in the moment 'when someone accepts the demands of interpretation and, *through the personal act of commitment*, affirms the position taken'.⁷⁷ This is more than consent to or acceptance of a particular rendering of the constitutional 'text', whether it is written, oral, or social.⁷⁸ 'Such affirmation entails a [unique] commitment to projecting the understanding of the norm at work in our reality through all possible worlds onto the teleological vision that the interpretation implies.'⁷⁹ The creation of constitutional meaning thus requires 'the objectification of that to which one is committed'.⁸⁰ In Cover's view, this can only be made possible by telling 'a story of how [the constitution], now object, came to be, and more importantly, how it came to be one's own', namely, a narrative.⁸¹ Narratives operate as the catalyst for persuasion by 'provid[ing] resource for justification, condemnation, and argument by actors within the group, who must struggle to live their [constitution]'.⁸² Moreover, by way of telling narratives in the process of persuasion, people of all political persuasions take part in the activity of constitutional (re)interpretation, turning the whole constitutional order into a jurisgenerative project (or simply jurisgenesis).⁸³ It is also in this way that narratives relate the founding moment to the constitutional order and reshape their relationship.

Through the lens of 'Nomos and Narrative', the constitutional order, which is the reification of the political project of citizens living as a community, turns out to be more than the combination of the documental constitution and its supporting institutions. It is a *nomos* in which citizens take part in the constitutional project and jointly give meaning to it. To put it differently, to be a constitutional *nomos*, the constitutional order needs to stand for what citizens aspire to and commit themselves to. Notably, citizens find themselves in the constitutional order not only through their elected representatives or institutions and procedures but also through narratives concerning the birth and growth of the constitutional order.⁸⁴ Either by entering into an individual dialogue with existing narratives about the constitutional order or by giving their own account of it, citizens partake of the construction of the constitutional *nomos*. On this view, the meaning of the constitutional order cannot be identified with the interpretation of constitutional norms but rather materializes in the ongoing jurisgenesis in which 'stories of peoplehood' are told to carry out the constitutional project amid the tension between interpretation and authenticity.⁸⁵ The genuine meaning of

⁷⁷ Cover (n 8) 45 (emphasis added).

⁷⁸ See Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 3-30.

⁷⁹ Cover (n 8) 45.

⁸⁰ *ibid.*

⁸¹ See *ibid.* See also Harris (n 63) 86-96.

⁸² See Cover (n 8) 46.

⁸³ See *ibid.* 15.

⁸⁴ See Balkin (n 11) 2-6; 25-32. See also Paul W Kahn and Kiel Brennan-Marquez, 'Statutes and Democratic Self-Authorship' (2014) 56 *Wm & Mary L Rev* 115, 173-77.

⁸⁵ Balkin (n 11) 2; Rogers M Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (CUP 2003).

constitutional norms can only be fully grasped when they are read together with the narratives concerning their creation, contention, and evolution in the life of the whole constitutional order. Thus, neither the normative purpose nor the underlying principles or values suffice to substantiate the meaning of constitutional norms as they are abstracted from the context in which the meaning is contained. It is narratives that bring the meaning-rich context to the fore.

Conceived of this way, the founding moment is related to the constitutional order not just as fact as the historicists claim or as norm as the normativists assert. Rather, it is to be narrated in relation to the ongoing constitutional project with an eye to satisfying the longing for identity/ authenticity. As noted above, the founding moment exists as historical occurrence in most cases. Recognizing this fact does not necessarily result in commanding fidelity from the constitutional order as some historicists suggest. Instead, the relationship between it and the resulting constitutional order is mediated by narratives.⁸⁶ Narratives about the founding moment, or rather, the founding episodes, are told not to define constitutional norms or settle interpretative disputes. Instead, they are invoked by citizens themselves to invite their fellow citizens living in the same constitutional order to come to terms with its genesis and reflect upon the constitutional project itself. The flawed constitutional order as it is can find redemption by engaging with its own growth trajectory from birth through the flow of fresh narratives.⁸⁷ For this reason, relating the founding moment to the ongoing constitutional order does not surrender the present generation's political destiny to the dead hand of the founding fathers and mothers. On the contrary, since the founding moment is related to the constitutional order through narratives, the constitutional *nomos* incorporates and reconstructs the founding moment by generating new narratives about the founding moment. Under the relational view, reciprocity characterizes the relationship between the founding moment and its ensuing constitutional order. Giving their own narratives, citizens of the here and now make decisions on the meaning of the life of the constitutional order after the founding moment but at the same time keep the constitutional project moving by engaging in constant persuasion as they take such decisions in anticipation of disagreement from their fellow citizens.⁸⁸ As a result, the relationship between the founding moment and the constitutional order is genuinely relational. It is no longer unidirectional as the stances of disregard, fidelity, and absorption connote.

With intermediary narratives, the relational view is also set apart from the normativist stance. Notably, narratives about the founding moment echo the normativist view of the founding moment as they are not aimed at re-enacting or remembering the birth of the constitutional order. Rather, they are employed to bring the foundational values and principles to the fore so the constitutional *nomos* can thus continue on these normative pillars and evolve alongside the society without being overwhelmed by the vicissitudes of time and fortune. Yet, narratives concern not only normative purpose or foundational values and

⁸⁶ Kahn (n 58) 27.

⁸⁷ Balkin (n 11) 119-23. cf Kuo (n 49) 709-11.

⁸⁸ Kahn (n 58) 71-77.

principles. A successful narrative must be coherent to be persuasive.⁸⁹ It is conducted in a structure of unity filled with subjects, events, and conflicts.⁹⁰ Narratives speak both to the political identity of citizens who find themselves in the constitutional *nomos* and to the identity of the constitutional order itself.⁹¹ Under the relational view, the founding moment is not only an attributed source of values or principles but also part of the quest for identity in the constitutional project.

Situated in the discovery of the meaning of the constitutional order mediated by narratives, the question of the founding moment in constitutionalism is freed from the grip of specialists in constitutional interpretation. As the founding moment is no longer related to the constitutional order only for the sake of the interpretation of constitutional norms, it cannot be mastered by methodology. Rather, its meaning is intertwined with the whole constitutional order's, which emerges from and evolves with refreshing narratives from citizens, not the monographs on interpretive methods or modalities from law professors.⁹² Instead of leaving the question of the founding moment in constitutionalism in the hands of specialists, citizens relate the founding moment to the constitutional order on their own terms through the medium of narratives.

Under the relational view, the founding moment is brought into contact with the constitutional order through narratives. The founding moment sits between fact and norm instead of being characterized either as fact or as norm as the historicist and the normativist view suggest. The question of the founding moment in constitutionalism raises fundamental issues concerning the meaning of the constitutional order beyond the interpretation of constitutional norms. The constitutionalization of the founding moment by virtue of narratives suggests rethinking the constitutional order as a *nomos* at the core of which is the construction of identity.

B. From Foundation to Invigoration: Founding Moments, Constitutions, and the Constituent Power

In the beginning of this paper, I noted that the constituent power and the founding moment, both of which are the essentials of constitutional genesis, share some characteristics in constitutional theory. One of them is that both stand at the interface of fact and norm.⁹³ Another concerns their relationship with the constitutional order. As I have argued in the foregoing sections, narratives bring the founding moment into contact with the constitutional order in a way that suggests that it sits between fact and norm instead of being either fact or norm. In terms of the close correspondence between the founding moment and the

⁸⁹ *ibid* 52-58. cf Jacco Bomhoff, *Balancing Constitutional Rights: The origins and Meanings of Postwar Legal Discourse* (CUP 2013) 90-91.

⁹⁰ Kahn (n 38) 62-73, 83-87.

⁹¹ See Balkin (n 11) 2-3.

⁹² See Richard S Kay, 'Constituent Authority' (2011) 59 *Am J Comp L* 715, 756-57.

⁹³ Schmitt (n 1) 75-78, 125-35.

constituent power, what is the image of the constituent power entailed by the narratives-mediated constitutionalization of the founding moment? To answer this question, a closer look at the relationship between the constituent power and the constitutional order will help.

The constituent power and the constitutional order are conceptually distinct.⁹⁴ The former gives birth to the latter while the latter only changes within the decisions made by the former. As a corollary, another conceptual distinction is drawn between the constituent power and the constituted power.⁹⁵ Viewed thus, the constituent power tends to be associated with action, free will, and freedom; the constituted power is part of the legal order underpinned by rules and other precepts.⁹⁶ Acting on the constituted power is not an exercise of free will in full but instead a disciplined application of legal provisions concerned aimed at an ordered liberty.⁹⁷ That said, the constituent power is not a kind of action to be taken lightly. To the existing constitutional order, the constituent power means disruption, even destruction, in the sense that the latter is invoked to break free of the former's grip. The constituent power can only engender a new beginning by putting the existing constitutional order to death.

Due to its duality of freedom and destruction, the concept of constituent power is unsettling. From the internal perspective of the constitutional order, it can only be remembered but should not be conceived. It needs to be suppressed to keep the constitutional order going. In contrast, when looked at from the external point of view, the constituent power is the symbol of freedom, the hope for liberation from the incorrigible existing regime, and the agency to bring about a pristine constitutional order.⁹⁸ As a result, uneasiness usually looms over how to characterize incidents that disrupt the standing constitutional order.⁹⁹ Should an instance of civil disobedience or rioting be seen as the sign of the resurrected constituent power?¹⁰⁰ At what point of time can this characterization be legitimately determined? Or, should disruptive acts of this sort instead be taken as lawbreaking behaviours that warrant punishment and even suppression? How about a military coup d'état?¹⁰¹

This is not the place for me to dwell on the various positions on the constituent power. Yet, the narratives-mediated constitutionalized founding moment as suggested above also

⁹⁴ Kuo (n 6) 399-400; Mark Tushnet, 'Peasants with Pitch Forks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power' (2015) 13 *ICON* 639, 645-46.

⁹⁵ Schmitt (n 1) 80, 128; Kuo (n 6) 399.

⁹⁶ See Kahn (n 58) 91-95. See also Kahn (n 56) 97-99.

⁹⁷ See Kahn (n 56) 84-90.

⁹⁸ Kahn (n 56) 97-99.

⁹⁹ Kuo (n 6) 395-98.

¹⁰⁰ Andreas Kalyvas, 'Popular Sovereignty, Democracy and the Constituent Power' (2005) 12 *Constellations* 223, 230; Joel I Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012) 178-83. See also Loughlin (n 10) 233-34.

¹⁰¹ See Schmitt (n 1) 142; Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup d'Etat and Common Law' (1994) 27 *Cornell Int'l LJ* 49.

points to an alternative reading of the constituent power.¹⁰² I have noted that by way of narratives, the founding moment contributes to the constitutional *nomos* as it is not only associated with the foundational values and principles but also marks the beginning of the growth trajectory of the constitutional order. Moreover, the founding moment that sets out the jurisgenerative constitutional project is also the time when the constituent power asserts itself. Thus, narratives about the founding moment are stories about the invocation of the constituent power, too. In this way, when the founding moment interfaces the constitutional order through narratives, the constituent power is also being narrated in relation to the jurisgenesis of the living constitutional *nomos*.

What is important about the duality of narratives about the founding moment and the constituent power is that narratives are not told to remember the past and commemorate landmarks at constitutional genesis. Rather, narratives themselves are constitutive of the constitutional *nomos*. They substantiate the rules, norms, institutions, and other constitutional precepts with meaning that makes the constitutional order a *nomos* citizens inhabit. Narratives about the genesis of the constitutional order also help with the reformation of the imperfect constitutional order by bringing the whole constitutional life into focus in the constant reflections on the state of the constitutional order.¹⁰³ More importantly, narratives make the democratic pursuit of the meaning of the constitutional project possible. In other words, constitutional genesis is not a mere past of the constitutional order. It continues to work on the present constitutional project by way of narratives about it. Thus, with narratives that bring the founding moment into contact with the ongoing constitutional order, the constituent power morphs from the generative force that brings forth the constitutional order into the rejuvenating energy that breathes new life into the constitutional project. The constituent power not only brings the constitutional order into existence but also sustains the constitutional *nomos* by way of narratives about the founding moment.¹⁰⁴ In a word, the constituent power is reincarnated in the narratives-mediated constitutionalized founding moment.

I hasten to add that the image of the constituent power emerging from the narratives-mediated constitutionalized founding moment does not suggest that the constituent power can or should be domesticated. As a conceptual construct, the constituent power may come in many guises in reality.¹⁰⁵ Nevertheless, the reincarnation of the constituent power in the narratives-mediated constitutionalized founding moment does point out a new temporal orientation of the constituent power. From the internal perspective of the constitutional order, the conventional wisdom has it that the constituent power stays in the past or resurrects in the future only to end the present constitutional order. On this view, the constituent power has no place in the present jurisgenerative process under the constitutional *nomos*.¹⁰⁶ It is for this reason that scholars who take the external view of the constituent

¹⁰² cf Loughlin (n 10) 228.

¹⁰³ Balkin (n 11) 2-4.

¹⁰⁴ cf Loughlin (n 10) 231-32.

¹⁰⁵ See Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (CUP 2008) 294-300.

¹⁰⁶ Kuo (n 6) 397-98; Tushnet (n 96) 645-51.

power charge that the constitutional order is aimed at neutralizing the constituent power by co-opting it.¹⁰⁷ Unless viewed from the external point of view and regardless of the disruptive effects it may entail, the constituent power is not oriented towards the present.¹⁰⁸

Yet, the reincarnation of the constituent power in the narratives-mediated constitutionalized founding moment means that the constituent power continuously bears on and reinvigorates the constitutional *nomos* through the narratives about the genesis of the constitutional order. The constituent power as the symbol of freedom is no longer confined to the foundation of the constitutional order. Rather, this alternative image of constituent power re-emerges in the invigoration of the constitutional project. Beyond foundation and destruction, the constituent power that is reincarnated in the constitutionalized founding moment works towards the maintenance of the constitutional order. Reincarnated in the narratives about the founding moment, the constituent power is not only remembered as a thing of the past but also relived in the present tense.

IV. CONCLUSION

Interpretation has dominated contemporary constitutional theories for too long. Studies of the founding moment either have been undertaken as part of the enterprise of constitutional interpretation organized along the divide between fact (fidelity) and norm (absorption) or have simply fallen outside the purview of constitutional theory (disregard). As a result, the formative role of the founding moment in the unfolding of the constitutional project has not yet received the attention it deserves. This not only creates the gap in constitutional imagination between specialists and the public but is also symptomatic of the pathology of contemporary constitutional theories: The more sophisticated constitutional interpretation becomes, the more elusive the meaning of the constitutional order appears to the public.¹⁰⁹

Alternatively, I have proposed a relational approach to the constitutionalization of the founding moment, according to which the founding moment sits between fact and norm. The founding moment is related to the constitutional order by virtue of narratives that substantiate the constitutional order with meaning, rendering the constitutional project jurisgenerative. The founding moment under the relational view proposed here can be further analysed in three aspects. In terms of substance, constitutional theory will have to extend beyond the debate over interpretive methodology to ‘stories of peoplehood’. Surely reframing the historical fact of the founding moment in constitutional terms through narratives is not just another restatement of constitutional theory on the role of history in the interpretation of constitutional norms. Rather, the process of accounting for the founding

¹⁰⁷ See Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (Maurizia Boscagli tr, University of Minnesota Press 1999).

¹⁰⁸ Notably, to alleviate the anxiety over its destructive potential, the constituent power has been recast as civil protest or irritant power. See eg Kalyvas (n 102) 230.

¹⁰⁹ cf Kahn (n 38) 117-26.

moment under the relational view recasts the understanding of the constitutional project in democratic terms. The discovery of the meaning of the constitutional order is not constitutional experts' privileged enterprise but rather requires the democratization of constitutional (re)interpretation. Narratives epitomize the media via which the meaning of the constitutional project can be democratically discovered. Through the narratives about the founding moment in the democratic pursuit of constitutional meaning, the constituent power can be brought to the fore in the present constitutional order without fearing its unsettling or destructive force

Apart from substance and process, the structure of narratives about the founding moment is the pivot of the underlying constitutional imagination of the collective constitutional project that involves every member of the political community. Narratives about the founding moment are part of the narratives about the growth trajectory of the constitutional order. They must be told in a structure of unity to be coherent and thus persuasive. This is not only an ethics of speaking constitutional language but also makes it possible for citizens to find themselves in the constitutional *nomos*. To make sense of the constitutional order, constitutional theory needs to look beyond interpretation and take the quest for meaning and identity in the constitutional project seriously.